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March 1, 2004

Michigan Supreme Court
Clerk's Office
PO Box 30052
Lansing, MI 48909

Re: Proposed Amendments to court rules
Supreme Court ADM File No. 2003-04

Dear Justices:

I am writing to oppose certain portions of the proposed amendments to the court rules, to support others, and to recommend wording changes in others.

I will proceed in order of the listing in the proposal, except for two matters of high importance that I will place first.

A. Most important provision not to enact as stated, Proposed Amendment to MCR 6.610(F).

This is the most unjust and dangerous of all the proposals, because in the list of materials that must be turned over in discovery, police reports and witness statements are not included. The proposal thus provides that a prosecutor can conceal police reports and witness statements relevant to a trial. What possible interest can that serve, other than the interest of injustice? How will a defendant ever prove that the unrevealed reports and statements were exculpatory if the defendant is not allowed to have them? How will the defense show that the trial testimony is unworthy of belief if deprived of the prior statements of the witnesses? The prosecutor will have the prior statements, and can use them as he pleases, while the defense is denied all access to this critical information. Justice should not be treated as a game to be rigged. The prosecutor should not be allowed to withhold evidence relevant to a case, period, whether the prosecutor perceives the evidence as exculpatory, or not.

B. Most important matter raised but not addressed by proposal, failure to discuss retroactivity of changes to Motion for Relief from Judgment rules.

I have some criticisms of and some praise for the proposed changes to the Motion for Relief from Judgment rules. If those rules are to be adopted as is, I see that they do not answer certain key questions about retroactive application. There will be substantial litigation, with many Circuit and Court of Appeals Judges working hard on trying to figure out what the Michigan Supreme Court meant, when the Michigan Supreme Court could decide it in the first place and save the judges, as well as the litigants and their attorneys, substantial work and expense.

The retroactivity questions arise because (1) the new Motion for Relief from Judgment rules would change the standards for judging motions and the legal issues raised, and (2) the new Motion for Relief from Judgment rules would adopt time limits for filing.

When Congress passed the AEDPA in 1996, affecting federal Habeas Corpus, and enacting a one year time limit in 28 USC § 2244, the federal courts determined that people with older convictions had a one year grace period in which to file a Petition for Habeas Corpus, even if strict application of the one year time limit would bar those people from filing. *Austin v. Mitchell*, 200 F.3d 391 (6th Cir. 1999). This could be established by rule which would avoid unnecessary litigation and uncertainty.

Another important retroactivity question arises from the fact that some prisoners in the past have filed Motions for Relief from Judgment and have lost on the "cause" issue, that is, they lost because they did not show "cause" why the legal issue was not raised before. If the new standards of the proposed amendment to MCR 6.508(D) are adopted, some legal issues barred under the old rules would no longer be barred under the new rules. Of course, some prisoners would want to relitigate the issues that lost, because the issues, if judged by the new legal standards, might be able to prevail.

I therefore have these proposals, which assume that the proposed changes to the Motion for Relief from Judgment rules are enacted:

PROPOSAL 1, RE: DEADLINES. Add a section MCR 6.508(E)(3) which states:

"Defendants whose convictions are old enough that sections (E)(1) and (E)(2) would cut off or limit the right to file a Motion for Relief from Judgment, shall nevertheless be permitted to file a Motion for Relief from Judgment within one year of the effective date of these rules."

PROPOSAL 2, RE: ISSUES THAT ALREADY LOST ON THE BASIS OF "CAUSE" UNDER THE OLD MOTION FOR RELIEF FROM JUDGMENT RULES. Add a section MCR 6.508(D)(3) which states:

"If a defendant has previously filed an Motion for Relief from Judgment the following rules shall apply to the issues raised in a new Motion for Relief from Judgment:

(a) If the trial court in denying a previous Motion for Relief from Judgment rejected the issue based on the merits, the issue may not be raised again.

(b) If the trial court in denying a previous Motion for Relief from Judgment declined to consider the merits of the issue, because of the "cause and prejudice" rules of the former MCR 6.508(D) or any other procedural reason, the issue may be raised again, to be judged under the standards of the new MCR 6.508(D).

(c) If the trial court in denying a previous Motion for Relief from Judgment relied on the rules of "cause and prejudice," but also discussed and rejected the merits of the issue, the issue may not be raised again."

I will now turn my attention to the specific proposals on an item by item basis.

C. Proposed Amendment to MCR 6.001(E).

The proposal, by making rules always prevail over statutes, in my view would be illegal under *McDougall v Schanz*, 461 Mich 15 (1999). If the legislature wants to promote justice by passing statutes, this Court should not stand in the way wherever the statute promotes substantive rights. The proposal could be made fair if the following language were added: "subject to the rule of *McDougall v Schanz*, 461 Mich 15 (1999)."

D. Proposed Amendment to MCR 6.004(D).

The proposal changes the 180 day rule to make the defendant's rights dependent on the decision of public officials to send a notice. If the officials never send the notice, then the defendant has no rights. This is inappropriate. The proposal allows individual public officials to arbitrarily deprive defendants of rights, without providing any recourse. The proposal does not require the Department of Corrections to send the notice, so if prosecutors want the 180 day rule killed, they need merely persuade Department of Corrections officials not to send notices. In fact, they may not need to persuade the Department of Corrections officials, because those officials often feel that their interests coincide with those of prosecutors.

The proposal is particularly unfair where the same prosecutor's office has brought the charges leading to the first conviction. Of course the prosecutor knows when its prosecution sends someone to prison. To provide that the prosecutor does

not "really" know someone has gone to prison until the Department of Corrections chooses to send him a notice is a legal fiction.

The proposal is also improper because it overrules the legislative determination in MCL 780.131. Where a defendant has rights granted by the legislature, those rights should not be taken away, either by judges enacting court rules, or by prison officials deciding not to send notices.

E. Proposed Amendment to MCR 6.006.

I believe that some use of video conferencing can be helpful for many types of proceedings. However, I strongly feel that video conferencing is inappropriate for evidentiary hearings where the trial judge must base his ruling upon witness credibility. To properly judge the credibility of a witness, the trier of fact should be able to see the entire person, in three dimensions.

It is bizarre to have a rule that the trial judge determines witness credibility because of his greater opportunity to view the witness, and to disallow Court of Appeals judges from redetermining credibility, where the trial judge sees nothing more than the same video that the Court of Appeals judges could see.

I am also opposed to the use of video conferencing for guilty pleas. Often in a guilty plea proceeding the defendant feels lost, like he does not know what is going on, like he is missing out on what is happening. Not being taken to the courtroom will enhance those problems. Having guilty plea proceedings where the defendant does not even come to court will significantly affect the attitude of defendants about the legitimacy of the procedure.

If defendants come to realize that the only way to get to court is to have a trial, there will be fewer guilty pleas and more trials.

Of course, I also believe that the provision that would allow trials without the defendant personally present, without the defendant's consent, would constitute high-handed, arbitrary abuse that is so manifestly unjust and unconstitutional that it is hard to believe the proposal is being taken seriously.

F. Proposed Amendment to MCR 6.110(B).

The Court does away with the 14 day rule, allowing a judge at arraignment to set any date he feels like. This could be a month, maybe two months. For a defendant being held in jail this is a grossly unfair procedure, and possibly a constitutional violation because it fails to provide a remedy for a defendant being held without probable cause. See *Gerstein v Pugh*, 420 US 103 (1975).

While I agree that cases should not be routinely dismissed for a little tardiness, if there is no rule even setting a presumptive time to have a preliminary examination, enormous delay enters the system, for no good cause. The portion of

the proposal that says that a violation is harmless unless the defendant can show prejudice effectively means that virtually all violations are harmless, which means the judge can delay any case as long as he or she wants. If the judge happens to harbor bad feelings about the defendant, due process could be delayed indefinitely. This would be unjust.

G. Proposed Amendments to MCR 6.110(C) and (D).

Eliminating rules of evidence and Fourth Amendment protections from preliminary examinations in my view is unjust, and inefficient. If the prosecution does not have legally admissible evidence to bring the defendant to trial, this proposal would allow the defendant to be held anyway, and to face a trial which the prosecution cannot win. The result would be unjustified punishment of the defendant without trial, during a lengthy period of pretrial incarceration where the prosecutor and court know that they have no legitimate case against the defendant.

Under this proposal, a prosecutor could get a defendant bound over by having a police officer testify that he heard the defendant was guilty.

If there is not sufficient admissible evidence to support a bindover, then there clearly is not sufficient admissible evidence to support a trial. The defendant should not be held in such a situation.

By eliminating the rules of evidence at a preliminary examination, the Court would eliminate the main purpose of a preliminary examination, that is, to see if there is enough evidence to conduct a trial. Under the proposal, hearsay and rumors and opinion can support a bindover, but still cannot support a trial. If there is not sufficient admissible evidence to support a bindover, there should not be a bindover.

H. Proposed Amendment to MCR 6.112(G).

Taken literally, this provision would allow a prosecutor to file charges after the expiration of the statute of limitations, depriving defendants of important rights granted by legislation, in violation of *McDougall v Schanz.* This should be reworded to make clear that is not the Court's intent.

I. Proposed Amendment to MCR 6.113(D).

A transcript of the preliminary examination is usually essential for the defense at trial, and is generally helpful to the prosecution as well. I see no reason for a court rule that makes unavailable this important evidentiary tool. The main effect of this rule will be that prosecution witnesses will be able to change their testimony willy-nilly between preliminary examination and trial, without fear of exposure.

Also, you have an equal protection problem, that is, a wealthy defendant can buy a transcript of the preliminary examination, while an indigent with an appointed lawyer cannot get such a transcript.

J. Proposed Amendment to MCR 6.302(B)(3).

I am concerned about the provision that advising the defendant on paper of the rights concerning a guilty plea can now take the place of face to face explanation given to the defendant. The reason I am concerned is that so many defendants have limited reading skills. Many of those defendants end up pleading guilty, but with this new rule they could be deprived of information about their rights, without any real benefit to be gained by the deprivation. By adopting this rule, the Court would be introducing a vulnerability into most guilty pleas, making it likely that many defendants who plead guilty will be able to get those pleas overturned in federal court on the ground that they did not understand the rights because they could not read the form.

K. Proposed Amendment to MCR 6.414(H).

I do not see any reason to allow judges to unilaterally decide to give jury instructions before the closing arguments. In my view, this procedure adds enormously to the prosecutor's case, by making the prosecutor's ringing call to action the last thing the jury hears. The last thing the jury hears should be the balanced words of the trial judge instructing them on the law.

L. Proposed Amendment to MCR 6.610(E)(2).

I think it is inappropriate that a person could be convicted of a crime without the right to an attorney, then have that conviction used against him to enhance a later sentence. The opportunities for injustice this provides are immense.

M. Proposed Amendment to MCR 6.501(A).

I see no reason to restrict Motions for Relief from Judgment to people who are still in custody. I have seen no statistics showing that Motions for Relief from Judgment for people not in custody have caused any significant problems for the courts. I personally have filed dozens of Motions for Relief from Judgment, without ever once filing one for someone no longer in custody. However, if a person no longer in custody has suffered injustice, this rule declares by fiat that no remedy can apply.

The legislature provides the right to seek a new trial, and does not limit it to those still in custody. MCL 770.1; MCL 770.2. Therefore, I believe the proposal violates *McDougall v Schanz*, 461 Mich 15 (1999).

Under this rule, even if there is unquestioned proof that the defendant is completely innocent and someone else committed the crime, the judge would still be without authority to grant the motion if the defendant has already served his time. Suppose, for example, a rape defendant is cleared by DNA, and the DNA shows another, identifiable person as the criminal. The defendant would still have to have the wrongful conviction on his record for the rest of his life. This proposal does not serve justice.

N. Proposed Amendment to MCR 6.502(C).

I feel that the proposed limitation to 25 pages is inconsistent with the provision of MCR 6.502(A) that "The motion must specify all the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge." If you limit the motion and brief to 25 pages, then you are guaranteeing that in many cases all the issues cannot be raised.

If a brief to the Court of Appeals can be 50 pages, I do not see any legitimate reason why the brief in the trial court raising the same issues must be cut down to 25 pages. If 50 pages is not too long for Court of Appeals judges to read, it is not too long for Circuit Judges to read.

In one recent case of mine, *People v Loren Regelin*, Muskegon Circuit Court Case No. 96-139927-FH, we had a hearing on conflict of interest of counsel, which was highly dependent on facts and involves case law of a complex nature. The issue alone constituted 27 pages, not including the statement of facts, and not including the other issues raised. I see no benefit to requiring a defendant to substantially cut an issue with complex law and facts. I see no benefit to requiring litigants with a long issue of this nature to have to give up other legal issues in order to raise this one.

The proposed amendment is unjust, and accomplishes nothing other than making it more probable the prosecutor will win and the defendant will lose. If the defendant is to lose it should be based on a review of the issues, not on legal technicalities invented by judges whose very provisions prefer one litigant over another.

If the 25 page limitation for defendants will not be adopted, then there is no need to adopt the similar limitation on prosecutor answers, proposed in MCR 6.506(A). I feel that both parties should have the opportunity to argue their cases, without being hemmed in by unrealistic page limits.

O. Proposed Amendment to MCR 6.508(D).

If there are to be any subchapter 6.500 rules, then I approve of the general terms of this proposed amendment, which eliminate the grossly unjust rule of "cause," and seek to replace it with a formulation designed to identify cases where substantial injustice has been done. The old rule eliminated many legal issues without regard to the justice involved, requiring showings which were usually impossible to make, and which showings had no relationship to the justice of the case. I approve of the rule change that would replace the impossible showings with difficult showings, which actually are related to the justice of the case.

I quibble with one small portion, MCR 6.508(D)(1)(a), which, regarding retroactive changes in the law, requires for relief that there be "a fully retroactive change in the law." In my view, if the retroactivity applies to the individual defendant's case, there is no reason why he should be denied relief from judgment simply because the law is not "fully" retroactive. In other words, I feel that the retroactivity application should be that which applies to the individual case. A defendant should not be barred from applying a change in the law that retroactively applies to him simply because there might exist another defendant to whom the change in the law does not retroactively apply, hence the change in the law would not be "fully" retroactive. The "fullness" of the retroactivity should not be a factor at all.

P. Proposed Amendment to MCR 6.508(E).

This proposal is similar to that rejected by the Supreme Court in 2001 in File No. 00-31. I object for the same reasons I stated back then, which at that time did prevail with the Court.

MCL 770.1 and 770.2 provide the authority for the trial court judge to grant a new trial, even if the applicable time limits have expired. The proposed amendment would overrule the judgment of the legislature, and in my view would be plainly illegal under *McDougall v Schanz*.

The US Supreme Court used to think that violation of constitutional rights in a criminal prosecution deserves a remedy, no matter how much time has gone by. In *Pennsylvania ex. rel. Herman v. Claudy*, 350 U.S. 116 (1956), the Supreme Court unanimously held:

> "Nor was petitioner barred from presenting his challenge to the conviction because 8 years had passed before this action was commenced. Uveges did not challenge his conviction for 7 years. 335 U.S. 437, 438-439. And in a later case we held that a prisoner could challenge the validity of his conviction 18 years after he had been convicted. *Palmer v. Ashe*, 342 U.S. 134. The

> sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy."

The Michigan courts formerly understood this principle, and repeatedly granted review under circumstances that the present and proposed rules would prohibit. See *Attorney General v Recorders Court Judge*, 341 Mich 461, 472 (1954); *People v Barrows*, 358 Mich 267 (1959); *People v Tubbs*, 64 Mich App 341 (1975); *People v Allensworth*, 401 Mich 67 (1977); *People v Bergin*, 63 Mich App 526 (1979); *People v Hamm*, 100 Mich App 429 (1980).

This "sound premise" that the Supreme Court recognized unanimously in 1956, and that this Court followed for years, has in recent years been completely rejected by this Court.

I feel that a rule that creates a technicality that prevents people from complaining about abuses of the courts is an abomination to a free society. The Constitution of Michigan, Art VI, §1, provides that the courts in Michigan are to be courts of "justice," which I submit means that justice must come first, over considerations of administrative convenience.

The court should be aware that many prisoners have no money for attorneys. Some have little access to lawbooks because of being in segregation (the hole). Some can barely read. Some suffer from severe mental and physical illnesses that make it impossible to act at all, much less quickly. Many of these people will be unable to meet the one year time limit.

Unless this Court can state with confidence that the fact one year has passed means there is no injustice in a case, the proposed rules promote injustice, by denying a right of access to the courts to complain about injustice.

If the time limits are to be passed, then I strongly recommend this Court enact a "grace period" as discussed above in subsection B. Where prisoners have been told for years there is no time limit for filing a Motion for Relief from Judgment, it would be unjust to suddenly take away their right to file by enacting a time limit that automatically and instantly removes the right to file.

Q. Proposed Amendment to MCR 6.508(F).

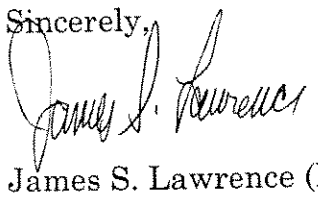
I strongly support this proposed change, which regularizes and eliminates the freakish unpredictability of whether the defendant's right to appeal can be maintained or reinstated when the lawyer simply fails to perform. I have had several such cases in the past and the results on reinstating the right to appeal have been inconsistent.

R. Conclusion.

I appreciate the Court's process for allowing public comment on the proposed court rule changes, because otherwise the voice of criminal defense attorneys might not be heard. Our opinions are not always right, but they are always relevant and always something the Court should consider before adopting court rule changes.

I look forward to seeing what the Michigan Supreme Court will do with these proposals.

Sincerely,



James S. Lawrence (P33664)